IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAY BUCK BROWN,
Appellant.

No. 2 CA-CR 2018-0207
Filed September 23, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20170527001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Jay Brown appeals his convictions and sentences stemming from repeated incidents of sexual abuse of his minor stepdaughter over multiple years. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the evidence and all reasonable inferences in the light most favorable to sustaining the jury's verdicts." *State v. Holle*, 240 Ariz. 300, ¶ 2 (2016). In February 2009, Brown married a woman with children from a prior relationship, including a daughter under the age of twelve, C.G.[1] Shortly after the marriage, Brown and his new wife rented a duplex on Blacklidge Drive in Tucson. A couple of months afterwards, Brown began touching C.G. inappropriately.

¶3 The first incident, which took place in the marital bedroom of the Blacklidge duplex, involved Brown touching C.G.'s genitals, forcing her to touch his penis, and performing oral sex on her. Although C.G. testified she did not recall the details of the last time Brown touched her inappropriately at the duplex, she also testified that all three types of inappropriate conduct occurred more than once at that address.

¶4 In November 2009, the family moved from the Blacklidge residence to a house on Euclid Avenue. When asked during trial if she remembered the first sexual interaction Brown had with her at the Euclid house, C.G. testified, "I don't remember all of it." But she did recall that, when she was in sixth grade, Brown forced her to have sexual intercourse with him for the first time. It occurred in the marital bedroom of the Euclid house, during an incident that also involved Brown touching C.G.'s genitals, performing oral sex on her, and forcing her to perform oral sex on him.

[1]C.G. was born in October 2000.

¶5 C.G. further testified that, when she was about fourteen, Brown ordered her to meet him in a shed behind the house. There, Brown again performed oral sex on her, forced her to perform oral sex on him, and engaged in sexual intercourse with her until her mother walked in on them. C.G. additionally stated that the last incidents at the Euclid house occurred a few months later, when she was almost fifteen. During that incident, Brown performed oral sex on her and forced her to perform oral sex on him in a bed next to her sleeping stepsister. He then forced C.G. to perform oral sex on him in the kitchen, which her mother witnessed.

¶6 In August 2016, the family was evicted from the Euclid house and moved into a trailer on Wetmore Road. A few months later, at age fifteen, C.G. moved out and reported her abuse to two adult relatives. Police referred C.G. to the Children's Advocacy Center, where she was forensically interviewed.

¶7 Shortly after Brown learned C.G. had reported him, he attempted to commit suicide by setting the Wetmore trailer on fire. In a suicide note, he acknowledged his abuse of C.G. After he was rescued from the fire, Brown confessed to police that he had sexually abused C.G. beginning when she was "maybe 10," that this abuse included touching her genitals, oral sex, and intercourse with C.G., and that he was uncertain how many times these acts occurred.

¶8 At the conclusion of a three-day trial, the jury found Brown guilty of: eight counts of child molestation of a victim under fifteen; five counts of sexual conduct with a minor under twelve; four counts of sexual conduct with a minor under fifteen; and one count of indecent exposure in the presence of a minor under fifteen. For the crimes of sexual conduct with a minor under twelve, the trial court sentenced Brown to five consecutive life sentences, each without the possibility of release for thirty-five years.[2] We have jurisdiction over Brown's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

[2]The court also sentenced Brown to: twenty years for each of his four convictions for sexual conduct with a minor under fifteen, to run consecutively to all other counts; seventeen years for each count of child molestation, to be served concurrently with each other but consecutively to all other counts; and one year for indecent exposure, to be served concurrently to the other counts.

Challenges to the Indictment

¶9 For the first time on appeal, Brown argues the indictment was duplicitous and the prosecutor abused her discretion by failing to charge the case as a single count of continuous sexual abuse. Because Brown failed to object to these alleged errors before trial, we review only for fundamental, prejudicial error. *State v. Hargrave*, 225 Ariz. 1, ¶ 28 (2010). Under that standard, Brown bears the burden of establishing that fundamental error occurred and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-22 (2005).

Duplicitous Indictment

¶10 Each of the eighteen counts of the indictment in this case refers to a separate act: the first or last time Brown violated C.G. in a specific way at each address (sixteen counts), as well as the incidents of forced oral sex and indecent exposure witnessed by C.G.'s mother (two counts). Brown contends the indictment was duplicitous because the charges were "susceptible to a non-unanimous jury" and did not give Brown "notice of the allegations against him." We disagree.

¶11 An indictment is duplicitous if it charges more than one crime in a single count. *State v. Anderson*, 210 Ariz. 327, ¶ 13 (2005). "Duplicitous indictments are prohibited because they fail to give adequate notice of the charge to be defended, present the potential of a non-unanimous jury verdict, and make a precise pleading of prior jeopardy impossible in the event of a later prosecution." *Id.*

¶12 In *State v. Davis*, on which Brown relies, our supreme court found that one count of an indictment "impermissibly charged two crimes" when the prosecutor argued in summation that the defendant had sex with the victim on two separate occasions, either of which could support a finding of guilt on the one count in question. 206 Ariz. 377, ¶¶ 51-53, 59-60 (2003). No such argument was made here.

¶13 Beginning with its opening statement, the state stressed for the jury that the eighteen counts of the indictment "are broken down by location, acts and incidents." For this reason, the state asked the jury to: "take note of which act . . . [or] incident we are talking about and where we are talking about it so by the time you get to deliberations at the end of trial, you will be able to see how the State has met each point of the indictment." The state then outlined specific acts and where they had occurred. When eliciting testimony from C.G., the state asked questions to ensure that she

referenced the particular act described in each count of the indictment.[3] Then, in summation, the state expressly "r[a]n through the testimony and how it relates to the charges in the indictment so that [the jury could] remember which one relates to which counts." Thus, the record does not support any suggestion that the jury was confused about which single incident of conduct was alleged in each count. In other words, this is not a case in which the defendant "was convicted of one count, based on proof of two [or more] acts." *Id.* ¶ 60.

¶14 Brown argues only that the indictment failed to give him notice of the charges against him as to the "last" incidents at the Blacklidge duplex. Specifically, he emphasizes the vagueness of C.G.'s testimony that, although she could not recall the details of the last instances of each type of abuse at that location, she nevertheless recalled that they had each occurred there "more than once." This is not a challenge to the vagueness of the indictment, but rather to the sufficiency of the evidence presented by the state as to those counts—an issue we address below.

Abuse of Prosecutorial Discretion

¶15 Brown also argues it was an abuse of prosecutorial discretion for the state to charge him with eighteen separate counts based on specific instances of sexually abusive conduct, rather than a single count of continuous sexual abuse under A.R.S. § 13-1417. But, as the state points out, § 13-1417 requires the state to prove that three or more qualifying acts were committed against a child under fourteen "over a period of three months or more." It is well within a prosecutor's broad discretion to determine that

[3]Before trial, the state filed a notice of intent to use evidence of specific instances of other acts pursuant to Rule 404(c), Ariz. R. Evid., in particular that C.G. had disclosed during her forensic interview that Brown "touched her genitals many times" at both addresses and "forced her to touch his genitals, performed oral sex on her, made her perform oral sex on him, and penetrated her genitals with his penis many times" during the time frame described in the indictment. The trial court granted Brown's request that the state be precluded from introducing such evidence because it had not shown by clear and convincing evidence that the uncharged acts had occurred. At trial, in order "to avoid any violation of the Court's previous ruling regarding other acts under 404(c)," the court gave the state permission to ask C.G. leading questions.

single acts should be charged instead.[4] *See State v. Gagnon*, 236 Ariz. 334, ¶ 10 (App. 2014) ("When a defendant can be prosecuted under two separate statutes for the same conduct, 'the prosecutor has the discretion to determine which statute to apply' . . . ." (quoting *State v. Lopez*, 174 Ariz. 131, 143 (1992))). This is particularly true when, as in this case, it may be difficult for the state to prove that the acts in question all occurred within a qualifying time frame or when the victim was under fourteen, as required for a continuous sexual abuse conviction. "There is no constitutional bar to the full prosecution of all criminal law violators as long as that prosecution is not tainted with invidious discrimination," *State v. Rodriguez*, 158 Ariz. 69, 70 (App. 1988), and Brown has not alleged—much less shown—any such discrimination here.

¶16 Brown explains that § 13-1417 was enacted by the legislature to permit the state to "seek a conviction in otherwise hard-to-prove cases where the evidence is insufficient" due to the poor recall of a child victim. In exchange for lowering the state's burden of proof in such cases, however, the legislature limited the number of counts permitted (one per victim) and the penalty permissible, taking "the possibility of a life sentence and multiple consecutive sentences that are effectively life sentences off the table." Assuming without deciding that this legislative goal would require a prosecutor to charge a qualifying case exclusively under § 13-1417, we disagree with Brown that the evidence presented here was only sufficient to secure a conviction under the continuous sexual abuse statute. C.G. was not "incapable of identifying the date, time, location, and other relevant details" of each instance of sexual misconduct Brown committed against her. To the contrary, C.G. provided substantial detail regarding various events, and—even when she did not recall specific dates or details—she remembered where different types of specific abuse had occurred.[5] We

[4]As the state correctly points out, a defendant cannot be charged with both continuous sexual abuse and another sexual felony unless the latter is charged in the alternative or occurred outside of the requisite time period for continuous sexual abuse. A.R.S. § 13-1417(D); *see also State v. Larson*, 222 Ariz. 341, ¶ 16 (App. 2009). Moreover, the statute expressly prohibits the state from charging any criminal defendant with more than one count of continuous sexual abuse against a single victim. § 13-1417(D). Thus, a prosecutor's choice of charges requires careful consideration under the statutory scheme.

[5]C.G.'s mother also provided testimony regarding the details of certain instances of the abuse.

therefore reject the claim that § 13-1417 was "intended for this specific set of facts" and hold that the prosecutor retained broad discretion to charge the incidents individually.

¶17 Finally, Brown contends the state violated his due process right to notice of the allegations against him by charging him with specific instances of child molestation and sexual conduct with a minor under A.R.S. §§ 13-1410 and 13-1405, respectively, rather than one count of continuous sexual abuse under § 13-1417. But, as the United States Supreme Court has explained:

> That this particular conduct may violate [two or more statutes] does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied.

United States v. Batchelder, 442 U.S. 114, 123 (1979).

¶18 For all these reasons, we find no abuse of prosecutorial discretion in the charging decisions made in this case.

Sufficiency of the Evidence

¶19 Brown argues the state presented insufficient evidence to sustain many of his convictions for molestation and sexual assault. The "question of sufficiency of the evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, ¶ 15 (2011). We must decide whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* ¶ 16 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). Reversal is appropriate only when there is "a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)). We must "view the evidence in the light most favorable to sustaining the verdict, and we resolve all inferences against the defendant." *State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004).

¶20 Brown contends the evidence presented at trial was insufficient to support his convictions on counts two, four, and six—the "last time" Brown allegedly touched C.G.'s genitals, had her touch his penis, and engaged in oral sexual contact with her at the Blacklidge address. Brown does not contest that "[i]n child molestation cases, the defendant can be convicted on the uncorroborated testimony of the victim." *State v. Jerousek*, 121 Ariz. 420, 427 (1979). Rather, he argues C.G.'s testimony was insufficient to support his convictions on these counts because she did not remember with particularity more than one incident and could only testify that they had occurred "more than once" at the Blacklidge duplex. But C.G.'s testimony that each type of act occurred multiple times was sufficient to allow a reasonable jury to find that the additional acts occurred as alleged in the indictment. *See State v. Stuard*, 176 Ariz. 589, 603 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence."). That C.G. could not describe the date or some of the details of those incidents goes to the weight of the evidence she presented at trial, not its sufficiency. *See Jerousek*, 121 Ariz. at 427 (child molestation victim's testimony of prior acts of molestation admissible "[a]lthough the victim could not testify as to the exact dates on which these prior acts occurred" because "she was certain of their occurrence").

¶21 Next, Brown argues there was insufficient evidence to support any charge of oral sexual contact[6] because C.G. never described what "performed oral sex" means to her. He complains she never specifically testified that "she placed her mouth on [Brown]'s penis, nor that he placed his mouth on her vulva or anus." But there was no evidence that C.G. did not understand what it means to "perform oral sex." To the contrary, her understanding of the phrase was corroborated by testimony from her mother that she had seen Brown's penis in C.G.'s mouth during the incident in the kitchen on Euclid, as well as Brown's confession to police that he had forced C.G. to perform oral sex on him. From this evidence, it was reasonable for the jury to infer that when C.G. testified repeatedly regarding reciprocal acts of oral sex forced upon her by Brown, she was describing exactly what the indictment alleged.

¶22 Finally, Brown challenges the sufficiency of the evidence on count seventeen—the "last time" Brown penetrated her genitals with his penis at the Euclid address—arguing that, "although C.G. testified that Brown penetrated her vagina with his penis when they were in the shed, she did not testify that he ever did so again." This argument fails because,

[6]This includes counts five, six, eleven, twelve, thirteen, and fifteen.

as the evidence presented at trial made clear, the incident of sexual intercourse in the shed—which Brown concedes was sufficiently proven—*was* the last such incident at the Euclid address.

Constitutionality of A.R.S. § 13-705

¶23 Brown argues for the first time on appeal that his five life sentences for sexual conduct with a minor under the age of twelve were imposed pursuant to a statute that is unconstitutionally vague because it provides different punishments for the same conduct. We review a statute's constitutionality *de novo*, "construing it, if possible, to uphold its constitutionality." *State v. Hulsey*, 243 Ariz. 367, ¶ 67 (2018).

¶24 "A criminal sentencing scheme . . . is void for vagueness if it fails to state 'with sufficient clarity the consequences of violating a given criminal statute.'" *State v. Wagner*, 194 Ariz. 310, ¶ 11 (1999) (quoting *Batchelder*, 442 U.S. at 123). We will find a sentencing statute "void for vagueness if it fails to give 'the person of ordinary intelligence a reasonable opportunity to know'" what penalty may be imposed for a particular crime, "'so that he [or she] may act accordingly.'" *Id.* (alteration in *Wagner*) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

¶25 The trial court sentenced Brown pursuant to A.R.S. § 13-705, which provides enhanced penalties for dangerous crimes against children. Brown's convictions on counts five, six, eleven, thirteen, and sixteen were for sexual conduct (oral sexual contact) with a minor "under twelve years of age at the time of the offense." Such a conviction is unambiguously covered by subsection (A) of the penalty statute, which requires a life sentence for "sexual conduct with a minor who is twelve years of age or younger."[7] § 13-705(A). With these plain terms, the legislature expressed its intent—and placed reasonable people on notice—that oral sexual contact with a child under twelve carries a mandatory life sentence.[8]

¶26 Although subsection (B) of the penalty statute also refers to victims who are "under twelve years of age," § 13-705(B), that subsection

[7]The provision's express exception for masturbatory contact does not apply in this case.

[8]Indeed, at sentencing, Brown's counsel conceded that the statute required the trial court to impose "consecutive life sentences" and that the court only had discretion with regard to Brown's eight convictions for child molestation.

begins with the phrase, "Except as otherwise provided in this section . . . ." Subsection (A) contains no such qualifier. § 13-705(A). By beginning only certain subsections of the statute with the qualifying phrase, our legislature clarified which penalty should be imposed when, as in this case, the underlying conviction triggers more than one subsection: if subsection (A) of the statute applies, as it does here, subsection (B) does not. Because we reject Brown's claim that the statute is vague regarding the penalty established by the legislature for oral sexual conduct with a minor under age twelve, we likewise reject his claim that he received illegal sentences.

Motion for Mistrial

¶27 On the first day of trial, the court granted Brown's unopposed motion to preclude the state from presenting evidence or mentioning that any dogs had died in the fire at the trailer on Wetmore.[9] On direct examination, the state asked C.G.'s mother whether, when she had spoken with police about the trailer fire, "they gave [her] anything that [she] recognized that they found in the fire." Although the question had been intended to elicit information regarding the notebook containing Brown's suicide note, and although the prosecutor had warned the witness not to mention the dogs, she nevertheless responded, "Just my dog's ashes." Brown did not object to this testimony or request a limiting instruction. However, after a detective with the Tucson Police Department testified that Brown had explained "he intended on ending his life and tried to set [the] trailer on fire," Brown moved for a mistrial on the ground that, as a result of the combined testimony, the jury had learned that the fire Brown set in the trailer had resulted in the death of a dog, in violation of the court's order. Brown argued that such harm to "innocent animals, such as dogs" might bother certain jurors more than the allegations of his sexual abuse of a child. The court denied the motion, finding that any prejudice was minimal.[10]

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[9]The court also granted Brown's unopposed request to preclude mention of any allegations by C.G.'s younger sister, which the state had dismissed, or of the fact that Brown had previously spent time in prison. Brown has not adequately argued that any such precluded evidence was presented or mentioned at trial.

[10]In moving for a mistrial, Brown also argued the detective had "mention[ed] . . . something about investigating allegations with respect to the children," before "back[ing] off" to only C.G. Brown repeats this claim on appeal. Our reading of the record does not support this characterization

¶28 We review a trial court's denial of a mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32 (2000). We will not reverse a conviction unless there is "a 'reasonable probability' that the verdict would have been different" without the challenged testimony, *State v. Hoskins*, 199 Ariz. 127, ¶ 57 (2000), recalling that the judge who denied the mistrial was "in the best position to determine whether the evidence [would] actually affect the outcome of the trial," *Jones*, 197 Ariz. 290, ¶ 32.

¶29 The record contains abundant evidence of Brown's guilt. In addition to testimony from C.G. and her mother, who witnessed two of the charged instances of sexual abuse, Brown left a suicide note referencing his crimes and later confessed to having sexually abused C.G. in the ways charged in the indictment. Although the mother's statement regarding her dog's ashes arguably violated the trial court's order precluding evidence that any dogs died in the trailer fire, the court did not err in concluding that there was no reasonable probability that the verdict was affected.

Disposition

¶30 For the foregoing reasons, we affirm Brown's convictions and sentences.

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of the detective's testimony. His mentions of "the children" only related to Brown's statements that they were "good kids" who are "good in school," that any "in-fighting between the kids" was normal, and that Brown did not discipline them in extreme ways and had "fine" relationships with them. The detective's statements regarding the allegations against Brown were specific to "the allegations that [C.G.] was making" and did not imply that any other children had also made such allegations. We therefore reject as unsupported by the record Brown's assertion that the detective "mentioned during his testimony that he was investigating allegations against multiple children."